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IN THE HIGH COURT OF DELHI AT NEWDELHI

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W.P.(C) 5681/2017 & C.M.No.23728/2017 (stay)

USG BORAL BUILDING PRODUCTS (I) PVT LTD. Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate
with Ms. Shreya Dahiya, Mr. Rajesh
Sharma & Ms. Rita Jha, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Rakesh Kumar, CGSC for R-1 & 2.
Mr. Jitendra Singh & Mr. Vaibhav
Sharma, Advocates for R-3.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

24.07.2017

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Dr. S. Muralidhar, J.:

1. The challenge in this petition by USG Boral Building Products (India) Private Limited ('Petitioner') is to a Notification No. 26/2017-Cus.(ADD) dated 7th June, 2017 whereby, in exercise of the powers conferred under sub-sections (1) and (5) of Section 9A of the Customs Tariff Act, 1975 ('CTA') read with Rule 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ('ADD Rules'), the Central Government has ordered that Notification No.6/2013-Cus.(ADD) dated 12th April, 2013 issued by the Central

Government imposing a final Anti-Dumping Duty ('ADD') on imports of Plain Gypsum Plasterboard originating in or exported from China PR, Indonesia, Thailand, and UAE shall remain in force up to and inclusive of 6th June, 2018.

2. The facts are that pursuant to an anti-dumping investigation concerning import of Plain Gypsum Plasterboard originating in or exported from China PR, Indonesia, Thailand, and UAE, the Designated Authority ('DA') issued its preliminary findings by a Notification dated 19th March, 2012 recommending imposition of provisional ADD. On the basis of said recommendation the Central Government (Respondent No.1) levied provisional ADD on imports of the aforementioned products from the select countries by Notification No.32/2012-Cus.(ADD) dated 7th June, 2012.

3. On completion of the investigation, the Final Findings were issued on 15th January, 2013 whereby the DA recommended imposition of final ADD. Accepting the said recommendation, the Central Government issued the final duty Notification No.6/2013-Cus.(ADD) dated 12th April, 2013. This was valid for a period of five years from the date of imposition of the provisional duty, i.e., 7th June, 2012. In other words, the above Notification was to expire on 6th June, 2017.

4. The DA initiated a 'sunset review' investigation into the imports of Plain Gypsum Plasterboard originating from the aforementioned countries by way of an 'initiation notification' dated 5th June, 2017. The

said Notification *inter alia* noted that a petition had been filed by Saint Gobain India Private Limited (representing the domestic industry) (impleaded as Respondent No. 3 herein) in which *inter alia* it stated that the subject goods produced by it are similar to the goods imported from the subject countries in terms of physical and technical characteristics, manufacturing process and technology, functions and uses, etc. The period of investigation was to be for 12 months i.e., January to December, 2016.

5. Thereafter, the impugned Notification was issued on 7th June, 2017 in which after noticing the above facts it was stated that the Central Government was amending the Notification No. 6/2013-Cus.(ADD) dated 12th April, 2013 extending the time for operation of the Notification dated 12th April, 2013 upto and inclusive of 6th June, 2018.

6. Mr. Sandeep Sethi, learned Senior Counsel appearing for the Petitioner, has based his entire submission in support of the prayer in the petition on the judgment of the Supreme Court in ***Union of India v. Kumho Petrochemicals Company Limited 2017 SCC OnLine SC 644***. The short submission was that in terms of the second proviso to Section 9A (5) of the CTA there was to be no automatic continuation of the ADD during the sunset review. It was argued that the Notification issued by the Central Government extending the ADD during the period of pendency of the 'sunset review' should have been issued during the subsistence of the original notification. He submitted that in the instant case, the period of the original ADD Notification dated 12th April, 2013

came to an end at midnight on 6th June, 2017 i.e., five years from the date of imposition of the provisional duty. It was submitted that there was no notification continuing the ADD imposed by the aforementioned notification before its expiration on 6th June, 2017. That notification was issued only on 7th June, 2017, by which time the original notification had already expired. He, accordingly, submitted that the second proviso to Section 9A (5) of the CTA did not empower the DA to revive a dead notification.

7. Mr. Rakesh Kumar, learned Standing Counsel for the Central Government, submitted that in terms of the second proviso to Section 9A (5) of the CTA wherein a sunset review has been initiated prior to the expiry of the ADD notification then such ADD notification would continue to remain in force pending the outcome of the sunset review and in any event for not more than one year after such initiation of sunset review.

8. Mr. Jitendra Singh, learned counsel appearing for Respondent No. 3 i.e., representing the domestic industry, pointed out that the decision in ***Kumho Petrochemicals Company Limited*** (*supra*) was made in the context of there being a considerable gap between the initiation of the sunset review and the issuance of the notification continuing the ADD, whereas in the present case there was virtually no gap between the expiry of the period of the original ADD notification and the impugned notification. The expiry of the ADD under the original notification was on the midnight hours of 6th June, 2017 and the commencement of the

notification continuing the imposition of ADD was again in the midnight hour of 6th/7th June, 2017. Thus, there was no gap whatsoever as contemplated by the decision of the Supreme Court.

9. Mr. Jitendra Singh also drew the attention to Section 5 (3) of the General Clauses Act, 1897 ('GCA'), which states that an Act or a Regulation shall be construed as coming into operation "immediately on the expiration of the day preceding its commencement." He pointed out that there was no requirement under Section 9A (5) of the CTA or Rule 23 of the ADD Rules that the notification continuing the ADD during the sunset review had to be necessarily issued prior to the expiry of the earlier notification. He too referred to the decision in ***Kumho Petrochemicals Company Limited*** (*supra*) and pointed out that it did not contemplate a situation like the present one where there is virtually no gap between the expiry of the earlier notification and the issuance of the impugned notification.

10. The above submissions have been considered. At the outset, the Court would like to observe that the fact that the sunset review was initiated even while the original ADD notification dated 12th April, 2013 was in force is not disputed. The short question that arises is whether the impugned notification, dated 7th June, 2017, is sustainable in law in view of the interpretation of Section 9A(5) of the CTA by the Supreme Court in ***Kumho Petrochemicals Company Limited***. (*supra*).

11. To consider this question it is imperative that this Court undertake a

detailed discussion of the decision in *Kumho Petrochemicals Company Limited* (*supra*). To begin with, it is necessary to refer to Section 9A(5) of the CTA, which reads as under:

“(5) The anti-dumping duty imposed under this Section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:

Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of clumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension.

Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

12. The second proviso to Section 9A(5) of the CTA is an exception to the main portion of Section 9A which states that the ADD imposed thereunder earlier ceases to have effect on the expiry of five years from the date of imposition. In terms of the second proviso where the sunset review is initiated prior to the expiry of the period of five years, then the Central Government 'may' continue the ADD for a further period which does not exceed one year. Much stress has been placed on the words “may continue” to indicate the discretion of the Central Government not to continue the imposition of the ADD notwithstanding that the sunset review has been initiated.

13. In ***Kumho Petrochemicals Company Limited*** (*supra*), the facts were that a notification dated 30th July, 1997 was issued by the Central Government imposing ADD on import of Acrylonitrile Butadiene Rubber ('product') from Korea RP and Germany. The five-year period was to expire on 16th July, 2002 prior to which the first sunset review investigation was initiated by the DA. Accepting its recommendation, the Central Government issued another notification dated 10th October, 2002 whereby the ADD was to remain in force till 10th October, 2007. Two days prior thereto i.e., on 8th October, 2007, a second review investigation was initiated by the DA. This resulted in recommendation dated 4th October, 2008 for continued imposition of ADD on the import of the above product from Korea. On the basis of this recommendation, the Central Government issued another notification dated 2nd January, 2009, which was to remain in force till 1st January, 2014.

14. On 31st December, 2013 i.e., one day before the notification was to lapse, a third review investigation was initiated. Pursuant to the said sunset review, the Central Government issued Notification No. 6/2014-Cus. dated 23rd January, 2014 extending the validity of the duty by one year i.e., up to 1st January, 2015 pending investigation.

15. This notification came to be challenged. After analysing Section 9A of the CTA threadbare, the Supreme Court, in ***Kumho Petrochemicals Company Limited*** (*supra*), came to the following conclusions:

- i. In the first place, it was held that as far as initiation of the sunset review was concerned, once a decision was taken by the

Central Government on a particular date “that would be the relevant date” and not the date on which it was published.

ii. Since the sunset exercise was likely to take some time and might go beyond the period stipulated in the original ADD notification, “in order to ensure that there is no vacuum in the interregnum second proviso to Section 9A (5) of the Act empowers the Central Government to continue the ADD for a further period not exceeding one year pending the outcome of such a review.”

iii. The second proviso to Section 9A (5) of the CTA is only an enabling provision and therefore “power vested in the Central Government under the said proviso has to be specifically exercised, without which the anti-dumping duty cannot continue to remain in force with the lapse of original notification.”

iv. It cannot be said that without any overt act on the part of the Central Government there is an automatic continuation of the ADD. It was difficult to read the word “may” occurring in Section 9A(5) of the CTA as “shall”.

v. There may be a situation where even when the power is exercised under second proviso and duty period extended by full one year, the review exercise could not be completed within that period. In that situation, vacuum shall still be created in the

interregnum beyond the period of one year and till the review exercise is complete and fresh notification is issued. This situation belies the argument that extension under second proviso is to be treated as automatic to avoid the hiatus or vacuum in between.

(vi) On the facts of the case, on the date the Central Government issued the notification dated 23rd January, 2014 extending the ADD, “there was no Notification in existence the period whereof could be extended.”

(vii) Two things which follow from the reading of the Section 9A (5) of the Act are that not only the continuation of duty is not automatic, such a duty during the period of review has to be imposed before the expiry of the period of five years, which is the life of the Notification imposing anti-dumping duty.

(viii) Even otherwise, Notification dated 23rd January, 2014 amends the earlier Notification dated 2nd January, 2009, which is clear from its language, and has been reproduced above. However, when Notification dated 2nd January, 2009 itself had lapsed on the expiry of five years i.e., on 1st January, 2014, and was not in existence on January 23, 2014 question of amending a non-existing Notification does not arise at all.

(ix) As a sequitur, amendment was to be carried out during the lifetime of the Notification dated 2nd January, 2009. The High

Court, thus, rightly remarked that Notification dated 2nd January, 2009 was in the nature of temporary legislation and could not be amended after it lapsed.

16. What appears to have weighed with the Supreme Court in *Kumho Petrochemicals Company Limited* (*supra*) was the void or gap between the expiry of the original notification and the issuance of the notification extending the ADD i.e., between 1st and 23rd January, 2014. That case is distinguishable from the present case on the basis of this single fact.

17. The termination of the original notification was on the midnight of 6th/7th June, 2017. The commencement of the notification continuing the ADD was again at the midnight of 6th/7th June, 2017. Section 5(3) of the GCA reads as under:

“5. Coming into operation of enactments. –

XXXX XXXX XXXX XXXX XXXX
(3) Unless the contrary is expressed, a Central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.”

18. The Court, therefore, finds that there is no hiatus as such between the original notification imposing the ADD and the impugned notification continuing it. If indeed, in terms of Section 5 (3) of the GCA, which by analogy could be extended to notification issued by the Central Government as well, the notification comes into operation “immediately on the expiration of the day preceding its

commencement”, it takes us to the point where there is no gap whatsoever between the expiration of the old notification with the commencement of the new. The key words are “immediately on the expiration.”

19. It is trite that a notification issued during the day on any particular date would begin to have effect from the midnight at the beginning of that date. Thus, notification issued on 7th June, 2017 would be effective from the midnight of 6th/7th June, 2017. Since it was to take effect immediately on the expiry of the original ADD notification which came to an end at midnight on 6th June, 2017, there is not even an artificial gap, if at all.

20. Clearly, the facts in *Kumho Petrochemicals Company Limited* (*supra*) revealed the existence of a sizable hiatus of more than 20 days between the two notifications i.e., one continuing the ADD and the original ADD notification. That is, however, not the case here as the intention of the Central Government to continue the ADD without a gap is evident in the present case.

21. In the circumstances, it is not possible to accept the submission of Mr. Sethi that the impugned Notification dated 7th June, 2017 was issued after the expiry of the original ADD Notification which came to an end at the midnight of 6th June, 2017.

22. For all the aforementioned reasons, the Court is not satisfied that

any case has been made out by the Petitioner for quashing the Notification dated 7th June, 2017. The writ petition is, accordingly, dismissed along with the pending application, but in the circumstances, with no order as to costs.

S.MURALIDHAR, J.

PRATHIBA M. SINGH, J.

JULY 24, 2017

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